

July 20, 2021

Alejandro Reyes
Director of Program Legal Group
Office for Civil Rights
U.S. Department of Education
Potomac Center Plaza (PCP)
550 12th Street SW
Washington, DC 20024

Mr. Reyes,

The [Alliance Against Seclusion and Restraint](#) (AASR) is grateful for the opportunity to respond to the request for information regarding the nondiscriminatory administration of school discipline (ED-2021-OCR-0068). AASR is a community of over 13,000 parents, self-advocates, teachers, school administrators, paraprofessionals, attorneys, related service providers, and others working together to influence change in the way we support children who may exhibit behaviors of concern. The mission of AASR is to educate the public and to connect people who are dedicated to changing minds, laws, policies, and practices so that restraint, seclusion, suspension, expulsion, corporal punishment, and other abusive practices are eliminated from schools across the nation and beyond. Our vision is safer schools for students, teachers, and staff.

We know that school discipline is discriminatory, this is well documented. We know that disabled, Black, and brown students are disproportionately subjected to restraint, seclusion, suspension, expulsion, and corporal punishment. We know this from the examination of The United States Department of Education's Office of [Civil Rights Data Collection](#) (CRDC), an effort that has been collecting biennial data since 1968. Recently, the Government Accountability Office (GAO) released a [report](#) in which they analyzed CRDC discipline data from the 2013-14 school year. This report confirmed that Black students, boys, and students with disabilities were disproportionately disciplined

“regardless of the type of disciplinary action, level of school poverty, or type of public school attended.”

We know that the Office of Civil Rights (OCR) is charged with enforcement and monitoring to ensure that recipients of the Department of Education’s Federal financial assistance do not discriminate on the basis of race, color, national origin, sex, and disability. We also know that despite decades of policy guidance, technical assistance, compliance reviews, and enforcement action that there are significant issues with the disproportionality of discipline across the nation.

The Alliance Against Seclusion and Restraint is highly concerned about the issue of disproportionate discipline. Through research, we know that disabled, Black, and brown children are disproportionately subjected to restraint, seclusion, suspension, expulsion, and corporal punishment. We know that boys and very young children are more often targeted for exclusionary and aversive forms of punishment. We know children with a trauma history are more likely to suffer from harsh and inappropriate forms of discipline. The impact of this pattern is a clear violation of civil rights for many children. The impact of this pattern is that young, disabled, Black, and brown children are being pushed down the [school-to-prison pipeline](#). Despite widespread awareness and efforts that have been made to reverse the school-to-prison pipeline, harsh disciplinary practices continue, as do other factors that contribute to the school-to-prison pipeline. The Office of Civil Rights must do more to end discriminatory discipline practices that are pushing children into the criminal justice system.

In alignment with our mission and vision, we will address our concerns and make recommendations for reducing and eliminating the inappropriate use of seclusion and restraint for disciplinary purposes. The [most recent report](#), from the Civil Rights Data Collection (CRDC), indicated that 80% of students who were subjected to physical restraint were students with disabilities (IDEA). The same report indicated that 77% of students subjected to seclusion were students with disabilities (IDEA). This data alone should be adequate for demonstrating there is a clear systemic violation of civil rights

occurring in schools across the nation. We will also address the use of exclusionary disciplinary penalties, such as suspensions or expulsions, for minor, non-violent, or subjectively defined types of infractions. Finally, we will address the issue of corporal punishment as a practice in schools in the nineteen states that still allow the practice.

Recommendations for Guidance

In 2012 The United States Department of Education released a guidance document titled *[Restraint and Seclusion: Resource Document](#)*. This document included fifteen principles that the Department of Education believed states, local school districts, preschool, elementary, and secondary schools, parents, and other stakeholders should consider as the framework for when states, localities, and districts develop and implement policies and procedures related to restraint and seclusion to ensure that any use of restraint or seclusion in schools does not occur, except when there is a threat of imminent danger of serious physical harm to the student or others, and occurs in a manner that protects the safety of all children and adults at school. While not perfect the guidance was thoughtful and deliberate. The guidance set a high bar for the use of restraint and seclusion, the guidance made it clear that restraint and seclusion should not be used except for situations that involve an imminent danger of serious physical harm. Serious physical harm has a legal definition, which is the same as the definition for serious bodily injury, see below.

As defined at 18 U.S.C. 1365(h)(3), the term serious bodily injury means bodily injury that involves—

1. A substantial risk of death;
2. Extreme physical pain;
3. Protracted and obvious disfigurement; or
4. Protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

However, despite the high bar for using restraint and seclusion provided in the guidance, children are routinely restrained and secluded for noncompliance,

disrespect, minor behaviors, property damage, and for convenience of the staff. This is a trend we have seen from reporting across the nation. In an [investigation in Illinois](#), it was found that children were sent to seclusion rooms after refusing to do classwork, for swearing, for spilling milk, for throwing Legos. This is not the exception, rather it seems to be the rule. In our experience, in the vast majority of instances where restraint and seclusion are used in schools across the nation, the imminent danger of serious physical harm standard is not being met. While the guidance is clear that restraint or seclusion should never be used as punishment or discipline it is clearly what happens to young, disabled, Black, and brown children resulting in a clear violation of civil and human rights. To date, few states have implemented all of the recommendations from the guidance, but even states that have implemented much of the guidance into laws and policy, none are following the guidance with fidelity.

In 2016 the Department of Education's Office of Civil Rights published a Dear Colleague Letter titled [Restraint and Seclusion of Students with Disabilities](#). This guidance addressed the circumstances under which the use of restraint or seclusion can violate Section 504 and Title II. The letter supports the previous guidance and indicates that restraint and seclusion should only be used in situations that involve imminent serious physical harm. Further, the letter indicates that OCR would likely not find the repeated use of restraint and seclusion to be a justified response where alternative methods also could prevent imminent danger to self or others. The letter also referenced the *Restraint and Seclusion: Resource Document* published by the U.S. Department of Education for further information on the topic, including discouraging the use of restraint or seclusion more generally. In the introduction to the letter it is cited that during the 2013-14 school year, students with disabilities were subjected to mechanical and physical restraint and seclusion at rates that far exceeded those of other students. Specifically, students with disabilities served by the Individuals with Disabilities Education Act (IDEA) represented 12% of students enrolled in public schools nationally, but 67% of the students who were subjected to restraint or seclusion in school. Despite the guidance, the disproportionality has continued to increase as the latest report shows.

Use of Seclusion

We ask that OCR provides guidance stating that seclusion should not be used under any circumstance in schools that receive federal funding (direct or indirect).

Seclusion is not therapeutic nor does it provide any educational value. The use of seclusion is likely to lead to an increase in aggression and behaviors of concern. The fear and trauma of past seclusion use can invoke a fight or flight response in a previously secluded child, putting the student and staff at risk. Evidence supports that seclusion is most often used in situations that do not involve imminent serious physical harm. While often used under the premise that children need to be secluded when they become dysregulated there is nothing regulating about being forced into a room or area and having a door held shut. Children often lack the ability to self-regulate and need a well-regulated adult that can help them through the use of co-regulation. The use of seclusion is an adverse childhood experience (ACE) that can lead to lifelong trauma and posttraumatic stress disorder (PTSD). Guidance is not enough, we believe that federal funding should be withheld from school districts and nonpublic schools that continue to use seclusion.

We ask the OCR to expand the definition of seclusion. The current definition does not recognize the power differential between the adult(s) and the child. Children can be secluded even if they are not physically prevented from leaving due to a differential in power. Children may perceive that they are not free to leave if verbally commanded not to do so. We also believe that seclusion can take place with an adult or adults in the room or area if they are ignoring the student or placing demands on the child rather than offering support. We recommend an expansion of the definition of seclusion as follows:

“Seclusion refers to the involuntary confinement of a student alone in a room or area from which the student is physically or verbally prevented from leaving. It does not include a timeout, which is a behavior management technique that is part of an approved program, involves the monitored separation of the student in a non-locked setting, and is implemented for the purpose of calming. If a student is confined to a room or area with one

or more adults who are practicing planned ignoring or using their bodies to prevent egress it is considered seclusion.”

Use of Restraint

We ask that OCR provides guidance stating that prone and supine restraint should not be used under any circumstance in schools that receive federal funding (direct or indirect). We recognize that current guidance suggests that prone restraints or other restraints that restrict breathing should never be used because they can cause serious injury or death. To date, about 30 states have prohibited prone restraint. However, children continue to die after being placed in prone restraint holds. Although many safer inventions can be used there are schools across the nation that rely heavily on the use of prone and supine restraint. Guidance is not enough, we believe that federal funding should be withheld from school districts and nonpublic schools that continue to use prone restraint.

Use of Corporal Punishment

We ask that OCR provides guidance stating that corporal punishment should not be used under any circumstance in schools that receive federal funding (direct or indirect). A corporal punishment is a punishment which is intended to cause physical pain to a person. School corporal punishment is currently legal in 19 states, and over 160,000 children in these states are subject to corporal punishment in schools each year. OCR has collected data on corporal punishment in public schools for over 30 years, and we know that it is applied disproportionately to Black and disabled children. We believe that federal funding should be withheld from school districts that continue to use corporal punishment. We believe that shock devices such as the graduated electrical decelerator (GEC) used by the Judge Rotenburg center in Massachusetts is a form of corporal punishment and torture, and any direct or indirect federal funding should be suspended to the Judge Rotenburg Center and any public schools who refer children to the school.

Annual Guidance and Training

We ask OCR to provide annual guidance to local educational agencies on strategies to reduce and eliminate the use of restraint and seclusion. We know from the data that disabled, Black, and brown children are being disproportionately subjected to restraint and seclusion. This is a civil rights crisis and should be treated as such. We ask that OCR provide annual guidance and training in strategies to reduce the use of restraint and seclusion as long as it is having a disproportionate impact. This should include trauma-informed, neuroscience-based, relationship-driven, and collaborative approaches.

We ask that OCR and the United States Department of Education provide guidance to states and local educational agencies which is current with today's brain science.

Today many schools across the nation are dependent on classical behaviorism to control and manipulate behavior. Although reward and consequence models of addressing behaviors are failing many children they are widely used. Programs such as [Positive Interventions and Supports](#) (PBIS) have been implemented in many schools across the nation, yet the issue of behaviors of concern has not been improving nor has the issue of disproportionate discipline. In many cases, PBIS focuses only on surface behavior, which one can observe. The focus on surface behavior and the use of outdated, compliance-based, classical behaviorism methods continue to fail our students who most need help.

Over the past forty years, there has been a tremendous increase in the knowledge base about the brain, nervous system, human development, and behavior. This includes an understanding of the role toxic stress and trauma have on the structure of the developing brain and brain functioning. State-dependent functioning, the polyvagal theory, bottom-up versus top-down learning and control, and the differences between intentional behaviors and stress behaviors (flight, fight, freeze) are all part of this new understanding. However, despite all this progress students with disabilities and Black and brown students who are unable to meet the behavioral expectations are not supported or accommodated, but rather, they are routinely punished.

It is [time to shift to approaches](#) that are relationship-based, trauma-informed, neuroscience-aligned, developmentally appropriate, individualized, biologically respectful, and collaborative to support all children in schools across the nation. The solutions that will improve the educational system and improve outcomes for students are the same solutions that will eliminate restraint and seclusion in America's schools. An honest, unbiased review of the principles and research upon which the policies and practices are built is the first step. This must be followed by courageous commitment and action to make the changes necessary to align educational and discipline approaches with current research findings, the goals of the educational organization, and principles of equity. We recommend several approaches to better support all children including:

Collaborative and Proactive Solutions: [Collaborative & Proactive Solutions](#) (CPS) is the evidence-based model of care that helps caregivers focus on identifying the problems that are causing concerning behaviors in kids and solving those problems collaboratively and proactively. The model is a departure from approaches emphasizing the use of consequences to modify concerning behaviors.

Applied Education Neuroscience: The [Applied Educational Neuroscience certificate](#) program is specifically designed to meet the needs of educators, social workers, and counselors who work beside children and adolescents that are experiencing adversity and trauma. The certificate is intended to provide graduate and post-graduate students with an opportunity to become acquainted with the theoretical and empirical literature of educational neuroscience, trauma, and brain development as it relates to behaviors, relationships, and academic acquisition.

The Neurosequential Model: The [Neurosequential Model](#) is a developmentally informed, biologically respectful approach to working with at-risk children. The Neurosequential Model is not a specific therapeutic technique or intervention; it is a way to organize a child's history and current functioning. The goal of this approach is to structure assessment of a child, the articulation of the primary problems,

identification of key strengths, and the application of interventions (educational, enrichment, and therapeutic) in a way that will help family, educators, therapists, and related professionals best meet the needs of the child.

Beyond Behaviors: [Beyond Behaviors](#) highlights effective neuroscience-based tools to transform childhood behaviors. Time-out rooms, behavior chart consequences, and other methods that focus on correcting behaviors aren't working for the simple reason that they don't take into consideration the reasons underlying behavioral challenges: the child's individual differences and the state of the child's nervous system. Each child has a unique background, different strengths and challenges, and are at different points in their development. They require customized plans, rooted in science, that are specific to their needs.

Low Arousal: The [low arousal](#) approach enables professionals, educators, and family members to deal with and manage challenging behaviors. The approach empowers the individual or team to focus on the 'person' in the situation, identify causes and use proven low arousal skills to reduce the aggression. This approach acknowledges that stress is an ever-present part of the lives of people with autism, and asks how we can best manage crises where the individuals may be experiencing 'meltdown'.

Ukeru: [Ukeru](#) is a trauma-informed crisis management intervention that has successfully reduced and eliminated the use of restraint and seclusion in many schools across the nation. It is a trauma-informed approach that ensures a thorough understanding of the neurological, biological, psychological, and social effects of trauma and violence on an individual. Ukeru training is just the starting point; creating an environment of Comfort vs. Control requires a true cultural shift within a school, organization, or other behavioral health settings.

There are many better approaches to supporting children who are currently being traumatized by harsh discipline programs that are pushing them down the [school-to-prison pipeline](#). OCR should be working upstream to address the issues that are leading to the violation of civil rights for many children throughout the country.

OCR should be providing guidance and technical assistance to promote brain-aligned, trauma-informed interventions to make our schools safer for students, teachers, and staff.

Recommendations for Reporting

While OCR has been collecting data related to restraint and seclusion since 2009 there are many issues with the data collection effort. In fact, in 2019 the Government Accountability Office (GAO) [reviewed the OCR restraint and seclusion data](#) reporting and concluded that they had serious concerns about the quality of the data. "Our findings raise serious concerns about underreporting and misreporting of the use of seclusion and restraint," says Jackie Nowicki, a director at the GAO and author of the report. "It is therefore not possible to know the extent of the use of seclusion and restraint nationwide." Additionally, data review and analysis often take years to complete and the data does not appear to be used proactively to initiate investigation or compliance reviews.

We ask that OCR proactively address issues related to underreporting and misreporting. We believe that federal funding should be withheld from school districts that have been found to chronically underreport or misreport data.

We ask that OCR review, quality-assure, and make data available to legislators and the general public within 6 months of completed data collection. To have value in decision making, data must be accurate, quality-assured, and timely. Parents, school boards, lawmakers and OCR can not respond to protect the civil rights of children when there is a lag of 3 to 4 years from data collection to data availability. In the era of big data, it is inexcusable to wait years for data only to find out that the data lacks integrity.

We ask that OCR proactively analyze data related to restraint, seclusion, suspension, expulsion, and corporal punishment and that local educational agencies with the highest use (top 25%) should be investigated. If we want to reduce the use of restraint,

seclusion, suspension, expulsion, and corporal punishment systemic issues must be addressed. It is not enough to simply collect data, the Office of Civil Rights needs to proactively review and respond to data.

We ask that OCR investigate local educational agencies that report zero instances of restraint and/or seclusion. OCR should contact LEAs and verify results within 60 days of data collection. LEAs that report zero instances incorrectly in consecutive reporting cycles should be subjected to funding penalties.

We ask that OCR collect restraint and seclusion data for non-public or private placements in which public school students are placed through the IEP process. Students in more restrictive settings are more often restrained and secluded. Students in more restrictive settings are more often disabled, Black and brown. While these settings represent a small percentage of total enrollment in schools across the nation, they represent a majority of restraint and seclusion instances. A parent considering a non-public placement, through the IEP process, should be able to lookup data for restraint and seclusion as part of the CRDC data.

Conclusion

We appreciate the vision and mission of the United States Department of Education's Office of Civil Rights. We appreciate the many dedicated civil servants who work tirelessly to protect children in schools across the nation. It is difficult work, but very important work. We realize that there are limitations of what OCR can do in its role to prevent discrimination based on race, color, national origin, sex, and disability. However, more needs to be done. Black, brown and disabled children are having their civil and human rights violated in schools across the nation. When we examine the data it shows that there is a crisis in American schools. AASR hopes that we can collaborate to improve the outcomes for our nation's children.

We thank you for considering our public comment. The Alliance Against Seclusion and Restraint invites you to reach out with any questions or opportunities to collaborate towards solutions.

Respectfully,

A handwritten signature in black ink, appearing to read 'Guy Stephens', with a long horizontal flourish extending to the right.

Guy Stephens
Founder and Executive Director
Alliance Against Seclusion and Restraint

Cc: Dr. Miguel A. Cardona

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